UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/341,563	12/30/2011	Jon R. Gutknecht	FF11003USU	7820

78298 7590 04/21/2017

Jay M. Brown
JAY BROWN LAW FIRM
P.O. Box 1407
Cary, NC 27512

EXAMINER	
GWARTNEY, ELIZABETH A	

ART UNIT	PAPER NUMBER
1791	

MAIL DATE	DELIVERY MODE
04/21/2017	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JON R. GUTKNECHT and JOHN B. OVITT[1]

Appeal 2016-000528
Application 13/341,563
Technology Center 1700

Before PETER F. KRATZ, CHRISTOPHER C. KENNEDY, and MONTÉ T. SQUIRE, *Administrative Patent Judges*.

KENNEDY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's decision to reject claims 1–12 and 14–21. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

BACKGROUND

The subject matter on appeal relates to a process of making a cheese product. *E.g.*, Claim 1. Claim 1 is reproduced below from page 10 (Claims Appendix) of the Appeal Brief:

---

[1] According to the Appellants, the real party in interest is Franklin Foods Holdings Inc. App. Br. 3.

1. A process of making a cheese product, comprising:

providing a concentrated milk composition including milk protein, at a first temperature being at least about 20 degrees Fahrenheit (°F) above a melting point of the concentrated milk composition; and providing a plant fat composition including plant fat, at a second temperature being at least about 20°F above a melting point of the plant fat composition;

then combining a first amount of the concentrated milk composition being at the first temperature together with a second amount of the plant fat composition being at the second temperature, thereby forming a homogeneous composition that includes the milk protein and the plant fat, and that has an initial pH, and that has a concentration by weight of water being within a range of between about 49% and about 57%;

combining an amount of an edible acid together with the homogeneous composition that includes the milk protein and the plant fat, and directly setting the composition that includes the milk protein and the plant fat by adjusting the initial pH to a reduced pH being within a range of between about 4.9 and about 4.5, forming a homogeneous direct-set product that includes the milk protein and the plant fat; and

combining a third amount of the homogeneous direct-set product together with a fourth amount of a composition that includes a milk composition having been inoculated with lactic acid - producing mesophilic bacteria and subjected to culturing of the mesophilic bacteria to form lactic acid.

ANALYSIS

Claims 1–12 and 14–21 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brooks et al. (US 2008/0160133 A1, published July 3, 2008). The Appellants argue the claims as a group. We select claim 1 as representative of the rejected claims. The remaining claims on appeal will stand or fall with claim 1.

After review of the cited evidence in the appeal record and the opposing positions of the Appellants and the Examiner, we determine that the Appellants have not identified reversible error in the Examiner's rejection. Accordingly, we affirm the rejection for reasons set forth below, in the Final Action, and in the Examiner's Answer. *See generally* Final Act. 2–7; Ans. 2–8.

The Examiner finds, *inter alia*, that Brooks "does not disclose wherein the fat source and the protein source are combined and mixed after heating each component separately to temperatures at least about 20°F above their respective melting points. . . . Instead, Brooks et al. disclose combining a fat source, a protein source and a source of moisture, heating the mixture to temperatures above the melting point of the fat . . . and homogenizing the mixture . . . ." Final Act. 3–4. The Examiner thus determines that a difference between the claimed method and the method of Brooks is the order in which the steps are carried out; i.e., claim 1 requires individually heating the milk composition and the plant fat composition and then combining them, while Brooks teaches combining the milk composition and the plant fat composition and then heating them. *See id.* The Examiner concludes that "the selection of any order of performing the process steps is prima facie obvious in the absence of new or unexpected results." *Id.* at 4.

The Appellants argue that the order in which process steps are carried out "can be result-effective variables," that Brooks does not recognize "Appellant's result-effective variables," and that unexpected results support a conclusion of nonobviousness. *See* App. Br. 5–8.

We are not persuaded by those arguments. The Appellants cite two nonprecedential decisions of the PTAB in support of their position that the

order in which process steps are carried out may be considered a result-effective variable. *See* App. Br. 5–6. Although those cases are not binding on this panel, we have reviewed those cases, and neither case persuades us that the order of steps recited by claim 1 should be considered under a result-effective variable analysis. In *Ex parte Zaghouani*, Appeal No. 2012-009223 (PTAB July 1, 2013), it appears that the claim requirement that "the subject has undergone insulin autoantibody seroconversion *prior to* said administering step" (emphasis added) did not appear in the prior art. *See Zaghouani*, slip op. at 10–12. An analysis contemplating reordering of steps would have been inapposite because the prior art of record did not teach all of the steps. *See id.* To the extent that the Appellants rely on *Ex parte Masters*, Appeal No. 2007-0182 (BPAI Feb. 28, 2007), the Appellants provide no pin cite or discussion of the case, *see* App. Br. 6, and it appears to be a typical result-effective variable case in which the concentration of an ingredient—not the order in which steps are performed—was at issue, *see Masters*, slip op. at 4–5.

The Appellants' claim 1 recites an order of steps: the milk composition and the plant fat composition are "provid[ed]" at elevated temperatures (i.e., they are heated), and they are "then combin[ed] . . . thereby forming a homogenous composition." *See* claim 1. The Examiner finds, and the Appellants do not dispute, that Brooks also teaches the steps at issue, i.e., heating and combining to form a homogenized mixture, but that Brooks teaches first combining, and then heating. *See* Final Act. 3–4. On this record, we determine that case law concerning the order of steps in process claims is more germane to the disputed issues in this case than is case law concerning optimization of result-effective variables.

As the Examiner explains, *see* Final Act. 4, the selection of any particular order of performing known process steps typically is prima facie obvious in the absence of new or unexpected results. *See In re Burhans*, 154 F.2d 690, 692 (CCPA 1946); *see also In re Gibson*, 39 F.2d 975, 976–77 (CCPA 1930) (selection of any order of mixing ingredients is prima facie obvious). In the Appeal Brief, the Appellants do not meaningfully dispute the Examiner's determination that a difference between claim 1 and Brooks is the order in which process steps are carried out, as described above. The Appellants' argument that "there is no prior art recognition in Brooks of Appellant's result-effective variables," *see* App. Br. 7–8, is inapposite because, as discussed above, we are not persuaded that the result-effective variable analysis presented here is applicable, or that it outweighs the Examiner's determination of prima facie obviousness of the claimed subject matter based on re-ordering the steps of Brooks that is at issue in the rejection before us.

The Appellants also argue that unexpected results support their position. *See* App. Br. 6–7. Although presented in the context of result-effective variables, the argument is nevertheless relevant to the Examiner's analysis because the prima facie case set forth by the Examiner may be rebutted by unexpected results. *See Burhans*, 154 F.2d at 692. The Appellants' argument, however, is unpersuasive. While the Appellants use the word "unexpected," they provide no persuasive evidence or technical explanation suggesting that a person of ordinary skill in the art would have considered the alleged benefits to have been unexpected. *See* App. Br. 6; *cf. In re Klosak*, 455 F.2d 1077, 1080 (CCPA 1972) ("Thus it is not enough to show that results are obtained which differ from those obtained in the prior

art: that difference must be shown to be an *unexpected* difference." (emphasis in original)).

Moreover, the Appellants have not shown that the compositions of Brooks would not have possessed the same alleged benefits. *See, e.g.*, *In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991) ("[W]hen unexpected results are used as evidence of nonobviousness, the results must be shown to be unexpected compared with the closest prior art."). On the contrary, Brooks teaches compositions that are homogenous, *see* Brooks ¶ 14, and that have "a creamy and firm texture comparable to a full fat conventional case-in based cream cheese food product," *see* Brooks at Abstract. The benefits taught by Brooks appear to be the same as, or at least similar to, the alleged unexpected benefits of the claimed process. *See* App. Br. 6–7.

The Appellants also identify portions of the Specification suggesting that "deviations from the steps of the processes" "may" reduce homogeneity in the compositions ("a globular gel phase remaining separate from another phase of the concentrated milk composition"). *See* App. Br. 7 (quoting Spec. ¶ 37). However, the statements in the Specification are not persuasive of unexpected results, particularly given that they merely suggest the possibility of reduced homogeneity, which does not appear to be a problem in the composition of Brooks in any event. *See* Brooks at Abstract, ¶ 14. Accordingly, we are not persuaded that the claimed sequence of steps produces unexpected results relative to other known sequences, such as that of Brooks.

To the extent that the Appellants focus on new arguments in the Reply Brief, *see* Reply Br. 2–3 (arguing that claim 1 requires "two separate heating

steps" that "may be [at] two different temperatures"), those arguments are untimely, and the Appellants have not established good cause for failing to present those arguments in the opening Appeal Brief. *See* 37 C.F.R. § 41.41(b)(2). Even if they were timely, they would be unpersuasive because, as the Appellants concede, claim 1 does not require the first and second temperatures to be different from each other. *See, e.g.*, Reply Br. 3; claim 1; Spec. ¶ 14 ("difference between the first and second temperatures" may be "5°F or less"). Heating two different ingredients individually before combining them inherently could be considered as two separate heating steps. In other words, if you simply switched the order of the steps of Brooks (heat then combine, rather than combine then heat), two heating steps (i.e., one for each ingredient) would be necessary.

In any event, heating the compositions separately and then combining them, as claimed, appears to simply be a rearrangement of the order of a process disclosed by the prior art (heating and then combining instead of combining and then heating). As set forth above, we are not persuaded that new or unexpected results rebut the prima facie case of obviousness.

We affirm the Examiner's rejection of claim 1.

CONCLUSION

We AFFIRM the Examiner's rejections of claims 1–12 and 14–21.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED